

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

RICHARD DEEDS,

Plaintiff,

vs.

ROBERT BAYER, et al.,

Defendants.

3:03-CV-0453-LRH (VPC)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This report and recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is the motion of defendants, Jackie Crawford, Theodore D’Amico, D.O., Donald Helling, Rev. James Kelly, Keith Kennedy, Janet Lamb, and Donald Thorpe (“defendants”) for case-terminating sanctions as a result of plaintiff’s abusive discovery practices and failure to diligently prosecute (#312). Plaintiff Richard Deeds (“plaintiff”) opposed (#s 328/333) and defendants replied (#337). The court has thoroughly reviewed the record and recommends that defendants’ motion be denied.

**I. Procedural History**

On August 18, 2003, the District Court issued an order vacating a prior judgment in this action after it was dismissed without leave to amend (#1). The court ordered the case reopened and that it be given a new case number. *Id.* Over the ensuing four and one-half years, this court endeavored to manage this case through discovery, pretrial motions, and the filing of numerous dispositive motions. Apart

1 from the instant dispositive motion, there are now currently eight motions for summary judgment  
2 pending in this case (#s 327, 339, 343, 346, 347, 349, 355 & 363).

3 Defendants have accurately recounted the history of plaintiff's litigation tactics (#312). He  
4 repeatedly attempted to amend his complaint, he propounded sixty-one sets of discovery (by defendants'  
5 count), he filed numerous motions to compel discovery, motions for sanctions, and miscellaneous  
6 motions and briefs, most of which can fairly be characterized as repetitive, harassing, and often  
7 unintelligible. In addition, plaintiff's papers have often been replete with personal attacks on  
8 defendants' counsel, notwithstanding this court's admonitions that he cease such conduct. In other  
9 words, defendants' recitation of plaintiff's conduct throughout this case is correct. Defendants now seek  
10 case-terminating sanctions against the plaintiff for his continued bad faith in the face of court orders,  
11 admonitions, and sanctions.

12 The court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the plaintiff  
13 appears in *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit  
14 of any doubt." *Karim-Panahi v. Los Angeles Police Dep't.*, 839 F.2d 621, 623 (9<sup>th</sup> Cir. 1988); *see also*  
15 *Hanies v. Kerner*, 404 U.S. 519, 520-21 (1972).

## 16 **II. Discussion and Analysis**

17 Defendants seek dismissal of this action for abusive litigation based upon three alternative  
18 grounds: (1) Fed.R.Civ.P. 26(g)(3); (2), the court's inherent power to levy sanctions in response to  
19 abusive litigation practices; and (3) Fed.R.Civ.P. 41(b). Each is discussed in turn.

### 20 **A. Fed.R.Civ.P. 26(g)**

21 Fed.R.Civ.P. 26(g) governs discovery practices and provides for sanctions where an attorney  
22 or party propounds, responds, or objects to discovery for an improper purpose, "such as to harass or to  
23 cause unnecessary delay or needless increase in the cost of litigation." Rule 26(g)(1) requires that every  
24 disclosure, request for discovery, and response or objection must be signed by at least one attorney of  
25 record or by a party, if unrepresented. The signature constitutes a certification that to the best of the  
26 signer's knowledge, information, and belief, the document is complete and correct and is being served  
27 for proper purposes pursuant to the Federal Rules of Civil Procedure. *Id.* Rule 26(g)(3) further provides  
28

1 that if without a substantial justification a certification is made in violation of Rules 26(g), the court will  
2 impose appropriate sanctions on the signor for the violation, including attorney's fees. If there is not a  
3 substantial justification for a certification of the discovery at issue, by virtue of an attorney or party's  
4 signature, and it is made in violation of this rule, the court may impose "appropriate sanctions, which  
5 may include attorney's fees." Fed.R.Civ.P. 26(g)(3).

6 Defendants cite no cases which impose case-ending sanctions solely pursuant to Rule 26(g). In  
7 *In re Connelly*, 376 B.R. 161 (E.D. Mich. 2007), the bankruptcy court dismissed a trustee's claim with  
8 prejudice for discovery violations, but this was in conjunction with sanctions sought pursuant to  
9 Fed.R.Civ.P. 37. In *Connolly*, the trustee waited until the ninth day of trial to produce thirty-six boxes  
10 of relevant documents that the debtor had requested three years prior. The court held that "a party's  
11 failure to comply with Rules 26(e)(2) may give rise to sanctions under Rule 37(e)(1)." *Id.* at 182. The  
12 court further noted that dismissal is a severe sanction and should be imposed with great caution, but that  
13 if the failure to cooperate is willful, in bad faith, and with fault, dismissal is warranted. *Id.* (citations  
14 omitted). *Connelly* is distinguishable from this case, since the trustee's misconduct was egregious and  
15 clearly involved hiding evidence until the middle of trial. In addition, the debtor based the request for  
16 sanctions based upon repeated violations of Rule 37(e)(1).

17 The court found only one other case in which the district court entered a default judgment against  
18 a party pursuant to Rule 26(g)(3). *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11<sup>th</sup> Cir. 1997).  
19 The Eleventh Circuit reversed and held it was an abuse of discretion to enter a default judgment, since  
20 the district court had "effectively abdicate[d] its responsibility to manage a case involving contentious  
21 litigants and permit[ted] excessive and dilatory discovery tactics to run amok." *Id.* at 1356. Like  
22 *Connolly*, that case-ending sanction was also brought pursuant to both Rules 26 and Rule 37, and it  
23 offers no support for defendants' motion for the severe sanction of dismissal in this action solely  
24 pursuant to Rule 26(g).

### 25 **B. The Court's Inherent Power to Sanction**

26 Pursuant to the court's inherent power to sanction, dismissal is an available sanction when "a  
27 party has engaged deliberately in deceptive practices that undermine the integrity of judicial  
28

proceedings” or “has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.” *Leon v. IDX Systems Corp.*, 464 F.3d 951, 968 (9<sup>th</sup> Cir. 2006), citing *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9<sup>th</sup> Cir. 1995). The district court is required to consider the following factors before imposing the “harsh sanction” of dismissal: “(1) the public’s interest in the expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Anheuser-Busch*, 69 F.2d at 348.

***1. The public’s interest in the expeditious resolution of litigation***

Defendants are certainly correct that plaintiff’s massive and repetitive discovery requests and his incessant motion practice have delayed resolution of this case. However, there are now pending eight motions for summary judgment, three of which defendants have filed. Given the current status of this action, decisions on these dispositive motions will result in the most expeditious resolution of this case. This weighs against dismissal, notwithstanding the record of plaintiff’s conduct outlined in defendants’ motion.

***2. The court’s need to manage its docket***

The court agrees with defendants’ recitation of the myriad case management problems the court has experienced in this proceeding; however, now that dispositive motions are under submission to the court, the court will manage its docket through disposition of these motions. This factor does not favor dismissal.

***3. The risk of prejudice to the party seeking sanctions***

The court is keenly aware of the difficulties the defendants have experienced in this proceeding, ranging from the death and retirements of named defendants, faded recollections of events that occurred many years ago, as well as continual discovery problems that have arisen. However, in August 2003, the District Court issued its order that this action be reopened (#1), and it was necessary to re-open discovery, to adjudicate numerous discovery disputes, and to decide several dispositive motions. Discovery is completed, dispositive motions on the merits of the case are under submission to the court, and the prejudice defendants may have experienced is outweighed by the simple fact that this case is

1 finally is a position to be resolved through summary judgment or trial. In addition, it is almost certain  
2 that if this court granted the relief defendants request and dismissed this case as a sanction, plaintiff  
3 would appeal. If plaintiff prevailed, the case would be remanded, causing additional years of delay. The  
4 prejudice the defendants describe would be even greater. This factor weighs against dismissal.

5 **4. *The public policy favoring disposition of cases on their merits***

6 Defendants acknowledge that public policy favors resolution of cases on their merits, and  
7 defendants' contention that plaintiff's claims simply have no merit is not persuasive that the sanction  
8 of dismissal in this action is warranted.

9 **5. *The availability of less drastic sanctions***

10 The court has imposed increasingly more serious sanctions against plaintiff over the course of  
11 this proceeding, and while plaintiff continued to engage in some improper conduct, much of it  
12 dissipated, particularly as the parties approached the dispositive motion deadline. This factor weighs  
13 against dismissal.

14 The court concludes that the severe sanction of dismissal is not warranted in this case, as outlined  
15 herein. In reviewing those cases where case-ending sanctions have been ordered, the offending party's  
16 conduct was more egregious than what has occurred here. *See, e.g., Leon v. IDX Systems Corp.*, 464  
17 F.3d 951 (9<sup>th</sup> Cir. 2006) (plaintiff willfully deleted 2,200 files from his employer-issued computer during  
18 the pendency of litigation); *Televideo Systems, Inc., v. Heidenthal*, 826 F.2d 915 (9<sup>th</sup> Cir. 1987) (court  
19 did not abuse discretion in striking answer and entering default judgment against defendant as sanction  
20 for perjury, filing false pleadings, and engaging in pattern of racketeering activity).

21 **C. Fed.R.Civ.P. 41(b)**

22 Defendants posit Fed.R.Civ.P. 41(b) as a basis to dismiss plaintiff's complaint for failure to  
23 comply with the rules, which the court rejects. In reviewing the record in this action, the court cannot  
24 attribute the delays in the prosecution solely to plaintiff, and the court will not dismiss this action on that  
25 basis.

1 The parties should be aware of the following:

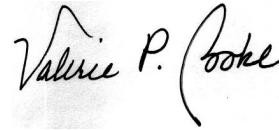
2 1. They may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules  
3 of Practice, specific written objections to this Report and Recommendation within ten (10) days of  
4 receipt. These objections should be titled "Objections to Magistrate Judge's Report and  
5 Recommendation" and should be accompanied by points and authorities for consideration by the District  
6 Court.

7 2. This Report and Recommendation is not an appealable order, and any notice of appeal  
8 pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

9 **III. Recommendation**

10 For the reasons stated above, the undersigned Magistrate Judge recommends that the District  
11 Judge enter an order **DENYING** defendants' motion for case terminating sanctions as a result of  
12 plaintiff's abusive discovery practices and failure to diligently prosecute (#312).

13 DATED: January 8, 2008.

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UNITED STATES MAGISTRATE JUDGE